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IN THE

Supreme Court Of The United States

TERM 1975
NO. 74-1147

Beatrice Harwell, Individually and
Beatrice Harwell as Administratrix of the
Estate of Roy R. Harwell, Deceased ..... *Petitioner*

V.

Westchester Fire Insurance Company, a
Division of Crum & Forster Insurance
Companies ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above titled case on January 20, 1975.

CITATIONS TO OPINIONS BELOW

The memorandum opinion at the U.S. Court of Appeals for the Eighth Circuit is unreported and is printed in the record certified from the U.S. Circuit Court of Appeals. The opinion of the District Court is printed in the

record certified from the U.S. Circuit Court of Appeals at page 30 of Appendix to Appellant's Brief.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 9, 1974. A timely petition for rehearing en banc was denied on January 20, 1975. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

The jurisdiction of the district court was invoked because of diversity of citizenship, the plaintiff being a citizen of Arkansas, and the defendant a foreign corporation doing business in Arkansas.

QUESTION PRESENTED

Whether the decision of the U. S. Circuit Court of Appeals for the Eighth Circuit has failed to apply the correct test of the sufficiency of the evidence as set forth in its own decisions and the decisions of this Court.

STATUTE INVOLVED

The statutory provisions involved are Ark. Stat. Ann. §66-3238, Suits against insurers - Damages and attorney fees on loss claims, and U. S. Code Ann. Title 28, Federal Rules of Civil Procedure, Rule 50.

STATEMENT

A suit was filed as an action in contract for failure of the insurer to pay the proceeds of an insurance policy under its uninsured motorist coverage to the petitioner

herein. On December 16, 1972, petitioner's husband died as a result of injuries in an automobile-pedestrian mishap on U. S. Highway 59, also known as the EASTEX Freeway, within the City limits of Houston, Texas. The issues were joined through the pleadings and the only question to be resolved by the trier of fact was the negligence of the uninsured motorist.

The evidence presented at trial disclosed that Roy R. Harwell left Little Rock, Arkansas, enroute to Houston, Texas at 5:00 A. M. on December 16, 1972. That same evening, his car was found on the shoulder of the south bound lanes of a divided highway and he was killed in the north bound traffic lanes. There were no eyewitnesses except the occupants of the uninsured motorist's automobile. No eyewitness was called at trial. The location of the deceased's car in the south bound lanes, out of gas, and his demise on the other side of a freeway lead to an inference that the deceased was crossing the freeway when he was struck. The evidence disclosed that the decedent was struck in the outermost north bound lane, about three feet from the outer edge of the travelled portion of the highway. The automobile which struck decedent was parked approximately 600 yards north of the point of impact.

The death occurred at approximately 9:00 p. m. The headlights and brakes of the automobile involved were found to be in proper working condition, but there was an absence of skid marks at the scene.

The testimony came from a police investigator arriving at the scene approximately one and a half hours after the incident occurred.

At the close of plaintiff's case, attorney for defendant moved for directed verdict. Motion was denied and defendant offered no evidence bearing on the negligence of the uninsured motorist. Following the jury verdict for the petitioner herein, respondent filed a motion for judgment notwithstanding verdict contending that the evidence of negligence on the part of the uninsured motorist was insufficient to present a jury question. The District Court disagreed and on May 7, 1974, judgment for petitioner was entered. On May 13, 1974, respondent filed notice of appeal and the Court below overturned the decision upon the authority of *Marshall v. Humble Oil & Refining Co.*, 459 F.2d 355, 358-59 (8th Cir. 1972) and *McKim v. Northwestern National Casualty Co.*, 256 Ark. 109, 505 S. W. 2d 756 (1974).

Essentially the Court reasoned that the Federal and Arkansas test of the sufficiency of the evidence to support a jury verdict are the same. *Marshall vs. Humble Oil & Refining Co.*, supra. Therefore, *McKim vs. Northwestern National Casualty Co.*, supra., because its facts closely resembled the instant case, was held to be controlling.

The Court below did not examine the test applied in the *McKim* case to see if the test applied in that case was the same as the federal test nor did it make any attempt to distinguish the cases factually.

A review of the federal cases dealing with the test of the sufficiency of the evidence is found in *Wetzel vs. Eaton Corp.*, 62 F.R.D. 22, 26-28 (D. C. Minn. 1973). Briefly stated these tests are known as the "equal inference" rule of *Pennsylvania R. Co. v. Chamberlain*, 228 U. S. 333, 339, 53 S. Ct. 391, 77 L. Ed 819 (1933) and the "evidentiary basis" test of *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct.

740, 90 L. Ed. 916 (1946). In *Wetzel*, the Court states that it follows the latter test in most of its cases. It was this test applied by the District Court in the instant case when he said, "it seems to be a question of analyzing the circumstantial evidence, and seeing whether it is adequate to make a jury case; and the only test there is, is that you view it most favorably to the plaintiff, and if there is substantial evidence from which a jury could find that Mrs. Lyssyj was negligent, then, of course, it should go the jury". . . . You have to look at the circumstantial evidence and the reasonable inference arising from it in order to decide whether there is enough evidence, substantial evidence, from which a jury could find negligence.

A review of the Arkansas cases disclosed that Arkansas adheres to the evidentiary basis test in the majority of its cases. In *McKim*, supra, the Arkansas Court stated, "We have searched for substantial evidence of negligence on the part of the driver, viewing the same in the light most favorable to plaintiff appellant". This is the "evidentiary basis" test of *Lavender v. Kurn*, supra. But, the Court below did not view the evidence in the light most favorable to petitioner. Instead, the Court searches the record for gaps in plaintiff's proof. Clearly, this is not the proper test. The Court must view the evidence which supports the petitioner's position and determine if it will support an inference of negligence, which can be rationally drawn by the jury.

Where the facts disclose a car parked on one side of the road and the driver killed on the other side, the inference that he was crossing the road when struck is a reasonable one.

If the man crossing the road had almost reached the other side, it is reasonable to infer that he had crossed the driver's field of vision.

If there were evidence that there was ample room to avoid striking the pedestrian and no evidence of any effort to slacken speed of the auto to allow said pedestrian sufficient time to reach safety, one might reasonably conclude the man was not seen.

It was this failure to keep a proper lookout which plaintiff has shown to be the proximate cause of the decedent's death. The circumstantial evidence through a well connected train of circumstances is a cogent of the existence of this fact as an array of direct evidence.

The lower Court stated that "there is no evidence whether there was traffic in the west lane which might prevent Mrs. Lyssyj from seeing the decedent if he were moving in an easterly direction or which might prevent her from avoiding the accident by turning to the left." Here the Court is propounding possibilities. They are possibilities rather than inferences because they are not supported by any evidence. As the lower Court has previously said "a party in a civil case has only the burden of proving his case by the preponderence of evidence. The existence of other possible causes cannot completely control the outcome of a plaintiff's case. Otherwise a party could never prove a prima facie case." *Twin City Plaza, Inc. v. Central Surety & Insurance Corporation*, 409 F. 2d 1195, 1203 (8th Cir. 1969).

Evidence as to the traffic at the time was offered by the plaintiff but it was the objection of the defendant which excluded the only testimony offered. Had the traffic

been a factor in defendant's favor, the only eye witness would have been called by the defendant. Any lack of testimony on this point should not prejudice plaintiff's case.

Additionally, Officer Faultry testified that he had "no difficulty seeing 500 yards or so in front of his vehicle as he arrived at the scene a short time later." The scene is not in dispute, and as in most freeway locations its construction is conducive to unobstructed vision.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in the instant case is believed to be erroneous and its prior decision in *Marshall vs. Humble Oil & Refining Co.*, 459 F. 2d 355, (8th Cir. 1972), and *The Alabama Great Southern R. Co. v. Chicago & N. W. Ry. Co.*, 493 F. 2d 979, 984 (8th Cir. 1974) to be correct.

2. The decision of the Court below in the instant case is directly in conflict with the decisions of this Court in *Tennant vs. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 34, 64 S. Ct. 409, 88 L. Ed. 520 (1964) where it is stated:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. *It is the jury, not the Court, which is the fact finding body.* It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. *The very*

essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

"Upon an examination of the record we cannot say that inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. *Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial.* (Emphasis mine).

CONCLUSION

For the foreging reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Ark. Stat. Ann. 66-3238. Suits against insurers—Damages and attorney fees on loss claims.—In all cases where loss occurs and the cargo, fire, marine, casualty, fidelity, surety, cyclone, tornado, life, health, accident, medical, hospital, or surgical benefit insurance company and fraternal benefit society or farmers' mutual aid association liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such person, firm, corporation and/or association shall be liable to pay the holder of such policy or his assigns, in addition to the amount of such loss, twelve per cent (12%) damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; said attorney's fee to be taxed by the court where the same is heard on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law collected; and writs of attachment or garnishment filed or issued after proof of loss or death has been received by the company shall not defeat the provisions of this section, provided the company or association, desiring to pay the amount of the claim as shown in the proof of loss or death may pay said amount into the registry of the court, after issuance of writs of attachment and garnishment in which event there shall be no further liability on the part of said company. [Acts 1959, No. 148, §305, p. 418; 1965, No. 437, §1, p. 1489.]

UNITED STATES CODE ANNOTATED

TITLE 28

FEDERAL RULES OF CIVIL PROCEDURE

Rule 50. Motion for a Directed Verdict

(a) When Made: Effect. A party who moves for

a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 74-1441

Beatrice Harwell, Individually, and Beatrice Harwell, as Administratrix of the Estate of Roy R. Harwell, Deceased,
Appellee,

Appeal from the United States District Court for the Eastern District of Arkansas.

v.

Weschester Fire Insurance Company,
Appellant.

Submitted: November 13, 1974
Filed: December 9, 1974

Before VAN OOSTERHOUT, Senior Circuit Judge, HEANEY, Circuit Judge, and MEREDITH, Chief District Judge.*

VAN OOSTERHOUT, Senior Circuit Judge.

*The Honorable James H. Meredith, Chief Judge, Eastern District of Missouri, sitting by designation.

This is a timely appeal by the defendant insurer from final judgment entered against it and order overruling its motion for judgment n. o. v. Beatrice Harwell, individually and as administratrix of the estate of her husband, brought this action for damages sustained as a result of the death of Mr. Harwell, a pedestrian on U.S. Highway 59, alleged to have been caused by the negligent operation by Dorothy Lyssyj of her automobile. This action is a direct action against the defendant insurer based upon the uninsured motorist provision in a policy issued by the defendant to decedent Harwell. It is agreed that such policy was in full force and effect and that Dorothy Lyssyj is an uninsured motorist. Jurisdiction based on diversity of citizenship and the requisite amount is established.

Defendant made timely motions for directed verdict at the close of plaintiff's evidence and again at the close of all the evidence and made motion for judgment n. o. v. subsequent to the judgment entered against it on a jury verdict for $10,000.00 damages plus a penalty of $1,200.00 and $3,600.00 attorneys' fees awarded under Arkansas Statute 66.3238. Such motions were based upon the ground that there is no substantial evidence to support a finding that Dorothy Lyssyj was guilty of any act of negligence. All such motions were overruled.

The sole issue upon this appeal is whether the court erred in holding that there was sufficient evidence presented to support a jury finding that Dorothy Lyssyj was negligent in any respect asserted in the operation of her automobile. For reasons hereinafter stated, we hold that there is no substantial evidence to support the jury finding of negligence. We shall first set out the applicable Arkansas law and then apply such law to the facts of the case.

Federal courts follow the conflict of laws rules prevailing in the forum state. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496-97 (1941). The Arkansas conflict rule is that the issue of the sufficiency of the evidence is procedural and thus is determined by Arkansas law. *Bell Transportation Co. v. Morehead*, 437 S.W.2d 234, 237 (Ark. 1969). Both parties have argued the case on the basis that Arkansas law controls. As we have frequently noted, the Supreme Court in *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 444-45 (1959), raised but declined to resolve the issue of whether the state or federal test of sufficiency of the evidence to support a verdict should be applied where federal jurisdiction is based on diversity of citizenship. For a good discussion of cases arising since *Dick*, *see Wetzel v. Eaton Corp.*, 62 F.R.D. 22, 25-26 (D.C. Minn. 1973). We need not reach such issue here as we have determined that the federal test and the Arkansas test of sufficiency of the evidence are substantially the same. *Marshall v. Humble Oil & Refining Co.*, 459 F.2d 355, 358-59 (8th Cir. 1972); *Bennett v. Wood*, 271 F.2d 349, 351 (8th Cir. 1959).

In *McKim v. Northwestern National Casualty Co.*, 505 S.W.2d 756 (Ark. 1974), the court affirmed a directed verdict for the defendant in a pedestrian case very similar factually to the case before us. No eyewitness testimony was offered in that case. The plaintiff could not recall evidence leading to the accident as he suffered from retrograde amnesia caused by his injuries. The court recognized the rule that 'a well-connected train of circumstances is as cogent of the existence of a fact as an array of direct evidence, . . . and that any issue of fact in controversy can be established by circumstantial evidence when the circumstances adduced are such that reasonable

minds might draw different conclusions.' 505 S.W.2d at 757. The court held:

> [W]e have no hesitancy in concluding that at most, appellant's evidence would do nothing more than afford the jury a choice of possibilities. When the evidence presents no more than such choice we have said that it is not substantial. *Kapp v. Sullivan Chevrolet Co.*, 234 Ark. 395, 353 S.W.2d 5 (1962). In the case at bar the appellant alleged: (a) failure to keep lookout, (b) inadequate warning, (c) excessive speed, (d) lack of required control, and (e) inadequate headlights. Applying the facts and circumstances established, we are simply unable to say that either of the allegations is supported by substantial evidence. Possibility of proximate cause is not enough; a reasonable probability must be shown by substantial evidence. [505 S.W.2d at 757-58.]

In our present case numerous specifications of negligence were asserted. The court submitted only two of such specifications to the jury, lookout and control. The court expressed the view that excessive speed had not been established and refused to submit such issue. The court also refused to submit other asserted specifications of negligence.

The only witness who gave any testimony as to physical facts underlying the accident is Officer Faultry of the Houston Police Department. The accident occurred about 9:00 p.m. on Saturday, December 16, 1972. Faultry arrived at the scene of the accident about an hour and twenty minutes after it had happened. The highway involved, U.S. Highway 59, is at the point of the accident a four-lane black topped highway with two thirteen feet lanes for travel in each direction. The night speed limit is

sixty-five miles per hour. There are no pedestrian crosswalks in the accident vicinity. There are some commercial buildings on each side of the highway but they do not light up the highway. The highway was dark and Officer Faultry used his flashlight to examine the road. Mrs. Lyssyj was driving north on the highway. Faultry found bloody marks and scrapings on the highway that indicated that the decedent at the time he was hit was three feet west of the east edge of the pavement. The officer found no evidence of skid marks at that location. The right front parking light of the car was knocked out and flesh was found on the right side of the car. The decedent's body had been moved before the officer arrived. Decedent's clothing was dark in color. The traffic on the highway was light at the time of the officer's arrival. There is no testimony as to the extent of traffic at the time of the accident.

The State patrol had examined the accident scene before Faultry arrived but such officers were not produced as witnesses. Plaintiff's answers to interrogatories disclosed that the plaintiff was aware of Mrs. Lyssyj's address and that she listed eight prospective witnesses, five with Houston addresses. Mrs. Lyssyj was not called as a witness and only Officer Faultry gave any testimony which had any bearing upon the accident.

There is no evidence as to decedent's movements just prior to the accident and there is no evidentiary basis for an inference that Mrs. Lyssyj by maintaining a proper lookout could have observed the pedestrian in a position of danger in time to avoid the accident. The night was cold. We do not know whether decedent was walking or running across the highway. We do not know the direction in which he was headed. If he came from the east and suddenly

entered only three feet into the highway, it is unlikely that he could have been seen in time to avoid the accident. There is no evidence whether there was traffic in the west lane which might prevent Mrs. Lyssyj from seeing the decedent if he were moving in an easterly direction or which might prevent her from avoiding the accident by turning to the left. During the course of the directed verdict argument the trial court observed:

> He was either just coming on [or] just going off. In the event she was in the right lane of a two-lane road that was ten feet within her own lane, she could have avoided him, and thirteen more feet in the lane adjacent which was also going in the same direction, so twenty three feet to go around if she—well, the strongest circumstance is that she did not see the man. There were no skid marks before or after. She had children in the car.

The burden of proof is upon the plaintiff to show negligence on the part of the car operator. In our present case as in *McKim*, the evidence offers the jury no more than a choice of possibilities. A reasonable probability that Mrs. Lyssyj's negligence caused the accident has not been established by substantial evidence. In *Bennett v. Wood, supra*, we stated, citing supporting authorities, "[c]ourts have uniformly held that verdicts cannot be based solely upon conjecture or speculation." 271 F.2d at 351.

We do not reach defendant's contention that decedent was guilty of contributory negligence as a matter of law.

The judgment is reversed. The case is remanded to the trial court with direction to sustain the motion for judgment n. o. v. and to dismiss the complaint.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 74-1441 September Term, 1974

Beatrice Harwell, etc.,

Appellee,

vs.

Appeal from the United States District Court for the Eastern District of Arkansas

Weschester Fire Insurance Company, etc.,

Appellant.

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

January 20, 1975